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IN THE

Supreme Court of the United States

October Term, 1981

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,
Appellants,
v.
BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee.

On Appeal From The Court of Appeals of New Mexico

BRIEF OF THE STATE OF NEW MEXICO

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QUESTIONS PRESENTED

1. Whether the Court should expressly apply the long-established "legal incidence" test, fashioned to deal with state tax threats to the sovereignty of the United States, to tribal claims that state taxes on non-Indians violate Indian sovereignty.

2. Whether New Mexico's gross receipts tax levied on a non-Indian general contractor's construction receipts from building a school for a school board on the Ramah Navajo Reservation, when the general contractor does business throughout New Mexico and when the school construction is accomplished solely by federal funds without the use of any Navajo Tribal funds, "infringes on the right of the Navajo Tribe to govern itself."

3. Whether the federal government has preempted New Mexico's gross receipts tax on a non-Indian general contractor, where the BIA approved of construction contracts which included the tax as a project cost and where Congress appropriated the construction funds based on construction budget estimates that included the tax as a project cost.

4. Whether the Indian trader licensing statutes, regulating the kind and quality of goods that a reservation Indian trader may sell to Indians, preempt New Mexico gross receipts tax on receipts from performing a construction service.

INDEX

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. THE COURT SHOULD EXPRESSLY ADOPT THE "LEGAL INCIDENCE" TEST TO DETERMINE WHETHER A STATE TAX INTERFERES WITH INDIAN SOVEREIGNTY 13

II. NEW MEXICO'S GROSS RECEIPTS TAX DOES NOT INFRINGE ON THE RIGHT OF THE NAVAJOS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM 16

III. CONGRESS HAS NOT PREEMPTED NEW MEXICO'S GROSS RECEIPTS TAX ON THE RECEIPTS OF THE CONSTRUCTION CONTRACTOR 20

A. Congress and the BIA were presented with construction budgets that included the gross receipts tax and they approved them 21

B. The focus of the preemption inquiry in this case should be on construction because that was the contractor's taxable activity 22

C. Congress has not preempted Indian education; on the contrary, it has recognized the state's role in Indian education and supported state construction of Indian schools, even on reservations 23

D. New Mexico has provided the taxpayer and the Ramah Navajos with benefits that justify assessment of its tax 27

IV. NEW MEXICO'S GROSS RECEIPTS TAX IS NOT PREEMPTED BY THE INDIAN TRADER STATUTES 28

Page

V. THE OTHER ISSUES RAISED ARE WITHOUT MERIT. 36

A. The New Mexico Enabling Act does not bar the tax in this case. 36

B. The Indian Commerce Clause does not prohibit this tax. 36

CONCLUSION 37

APPENDIX A – List of BIA–School Board Self-Determination Contracts and School Board–Lembke Construction Co. Contracts 1a

APPENDIX B – List of Buildings and Congressional Appropriations by Construction Phase. . 2a

APPENDIX C – School Board Appropriation Requests and Congressional Appropriations . . . 3a

APPENDIX D – New Mexico Statutes. 6a

TABLE OF AUTHORITIES

CASES Page

Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954) 29

Campbell v. Galeno Chemical Co., 281 U.S. 599 (1930) 35

Cardinale v. Louisiana, 394 U.S. 437 (1968) 28

Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 100 S.Ct. 2592 (1980). 15, 32, 33, 37

Commonwealth Edison Co. v. State of Montana, ___U.S.___ (No. 80-851, July 2, 1981) 14, 27

Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 279 U.S. 306 (1928) 27

Federal Communications Comm'n. v. American Broadcasting Co., 347 U.S. 284, *reh. den.* 347 U.S. 965 (1954). 35

First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 (1968) 13

Gurley v. Rhoden, 429 U.S. 200 (1975) 13

Hill v. California, 401 U.S. 797 (1968) 28

James v. Dravo Contracting Co., 302 U.S. 134 (1937) 13

Merrion v. Jicarilla Apache Tribe, ___U.S.___, 50 L.W. 4169 (Nos. 80-11, 80-15, January 25, 1982) 3, 17

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 3, 36

Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991, *cert. den.* 101 S.Ct. 1417, 49 L.W. 3619 (No. 80-812, February 23, 1981) . . 2, 3, 33

Page

Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) 14, 32, 37

Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (S.Ct. 1962) 4

Natonabah v. Board of Education, 355 F.Supp. 716 (D.N.M. 1973) 24

New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) 27

Norton v. Illinois Department of Revenue, 340 U.S. 534 (1951) 27

Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949) 15

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 30

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 36

Palm Springs Spa, Inc. v. Riverside County, 95 Cal.Rptr. 879, 18 C.A.3d 372 (1971) 35

Peters v. Hobby, 349 U.S. 331 (1955) 35

Prince v. Board of Education, 88 N.M. 548, 543 P.2d 1176 (S.Ct. 1975) 4, 24

Rockbridge v. Lincoln, 449 F.2d 567 (9 Cir. 1971) 31

Safeway Stores, v. Oklahoma Grocers, 360 U.S. 334 28

Tacon v. Arizona, 410 U.S. 351 (1972) 28

Thomas v. Gay, 169 U.S. 264 (1898) 36

Tinker v. Midland Valley Co., 231 U.S. 681 (1914) 32

United States v. Calamaro, 354 U.S. 351 (1957) 35

Page

United States v. County of Fresno,
429 U.S. 452 (1977) 13

United States v. State of New Mexico,
581 F.2d 803 (10 Cir. 1978) 2, 13, 14

United States v. State of New Mexico,
624 F.2d 111 (10 Cir. 1980), *cert. gr.*, No. 80-702
(February 23, 1981; arg. December 8, 1981) 2

United States ex rel. Keith v. Sioux Nation Shopping Center, 488 F.Supp. 496 (D.S.D. 1980) 34

Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685 (1965) 23, 29, 32, 33

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069 (1980). 13, 14, 15, 17, 26, 32, 36

White Mountain Apache Tribe v. Bracker,
100 S.Ct. 2578 (1980). . . 12,14,15,23,26,27,29,33,36

Williams v. Lee,
358 U.S. 218 (1958) 9, 10, 16

UNITED STATES CONSTITUTION

Indian Commerce Clause, Art. I, sec. 8, cl. 3 . . . 12, 36, 37

STATUTES

8 U.S.C. §1401(a)(2) 4

25 U.S.C. §231. 16

25 U.S.C. §261-264 . . . . . 12, 28, 29, 33, 34

25 U.S.C. §450. 25

25 U.S.C. §§452-457. 23

25 U.S.C. §458. . . . . 24, 25

28 U.S.C. §1257(2) 28

The Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§250 *et seq.* . . . *passim*

Page

Johnson-O'Malley Act, 25 U.S.C. §§452-457 23

P.L. 93-638 6

P.L. 95-232, 92 Stat. 31 (February 17, 1978) 3

10 Nav. Tr. Code §103 16

Act of March 1, 1793, 1 Stat. 329 31

Act of April 18, 1796, 1 Stat. 452 31

Act of March 3, 1799, 1 Stat. 743 31

Act of March 30, 1802, 2 Stat. 139 31

Act of June 21, 1906, 34 Stat. 325 32

Act of July 22, 1970, 1 Stat. 137 31

87 Stat. 1073 18

88 Stat. 810 18

Indian Self-Determination Act . . . . . *passim*

New Mexico Enabling Act, 36 Stat. 558,
N.M. Const., Art. XXI, sec. 2 . . . . . 12, 36

New Mexico Gross Receipts and Compensating Tax
Act, §7-9-1, *et seq.* NMSA 1978 1

§7-9-2 NMSA 1978 1

§7-9-3 NMSA 1978 1

§7-9-3(F) NMSA 1978 . . . . . 1, 2

§7-9-3(K) NMSA 1978 . . . . . 1, 2

§7-9-4 NMSA 1978 1

§7-9-51 NMSA 1978 . . . . . 1, 6

§7-9-52 NMSA 1978 . . . . . 1, 6

TREATISES AND PUBLICATIONS

Annual Budget of the Navajo Nation,
FY 1979, Window Rock, Az. 16

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pp. 348-351, fn. 2 31

Page

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Mahoney, *"Federal Immunity from State Taxation: A Reassessment,"* 45 U.Chi.L.Rev. 696 (1978) 13

Statistics 1978-1979, Public School Fin. Div., Dept. Fin. and Admin., State of New Mexico 18

Statistics, State of New Mexico, Dept. Fin. and Admin., Public School Capital Outlay Council, Santa Fe, N.M. (1982) 18

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Taylor, *The States and Their Indian Citizens,* U.S. Dept. Interior, BIA, 1972, ... 3, 24

Tribe, *"Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issue in Controversies About Federalism,"* 89 Harv.L.Rev. 682 (1976) . . . 13

REGULATIONS

25 C.F.R. 31 25

25 C.F.R. 251.3 33

25 C.F.R. 251.6 33

25 C.F.R. 252 35

25 C.F.R. 252.3(1) 35

25 C.F.R. 271 25

25 C.F.R. 274 . . . . . 25, 26

HEARINGS Page

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 92nd Congress, Second Session, Part 5, pp. 240-242 (1972) 4a

Senate Hearings Before a Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 92nd Congress, Second Session, Part 4, pp. 3647-3654 (1972). 4a

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 93rd Congress, First Session, Part 4, pp. 3617-3627 (1973) 17, 21

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 93rd Congress, Second Session, Part 5, pp. 1-3, 262-266 (1974) 17, 18

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Congress, First Session, Part 7, 270-281 (1975) 18, 20

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 94th Congress, First Session, Part 4, pp. 1686-1692 (1975) 18, 20

Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, 94th Congress, Second Session, Part 7, pp. 492-505 (1976) 19, 20, 22

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 94th Congress, Second Session, Part 5, pp. 2050-2056 (1976) 19, 20, 22

Page

Hearings Before the Subcommittee of the Committee on Appropriations, House of Representatives, 95th Congress, First Session, Part 9, pp. 600-630 (1977) 19, 20

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 95th Congress, First Session, Part 5, pp. 2207-2211 (1977). . . . 18, 19, 20

Hearings Before a Subcommittee on Appropriations, House of Representatives, 95th Congress, Second Session, Part 9, pp. 160-169 (1978) 8, 19, 20

Senate Hearings Before the Committee on Appropriations, Department of the Interior and Related Agencies Appropriations, 95th Congress, Second Session, Part 4, pp. 26-31 (1978). 8, 19, 20

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House Report No. 93-1600, 1974 U.S. Congr. & Adm. News 7780-7782; 7775-76; 7780-83 . . . . 25, 26

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BRIEF OF THE STATE OF NEW MEXICO

STATUTES INVOLVED

Pertinent provisions of New Mexico's Gross Receipts and Compensating Tax Act NMSA 1978, §§7-9-2, 7-9-3, 7-9-4, 7-9-51 and 7-9-52 are set forth in Appendix D, *infra.*

STATEMENT OF THE CASE

This appeal raises the issue of whether a state may be blocked from levying a non-discriminatory privilege tax on a general contractor who is not Indian, when he does business on a reservation. The tax is New Mexico's gross receipts tax, §§7-9-1 *et seq.*,

NMSA 1978, the same one involved in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10 Cir. 1980), *reh. den.* 625 F.2d 991, *cert. den.* 101 S.Ct. 1417 (No. 80-812, February 23, 1981), and in *United States v. State of New Mexico*, 624 F.2d 111 (10 Cir. 1980), *cert. gr.* No. 80-702 (February 23, 1981; arg. December 8, 1981).

The legal incidence of the New Mexico gross receipts tax is on the seller of services, even though the economic burden may by contract pass to the buyer. *United States v. State of New Mexico*, 581 F.2d 803 (10 Cir. 1978); *United States v. State of New Mexico*, No. 10-702, Brief for U.S., 25-26. In rejecting a claim that the legal incidence of the New Mexico tax is on the United States as buyer, Judge McKay described New Mexico's gross receipts statute as follows:

> The Act specifically makes the gross receipts tax applicable to the doing of business in New Mexico without reference to whether that business is with the United States and, with uniformly applied exceptions, assesses the tax upon anyone receiving compensation. There is no evidence that the tax interferes with the performance of federal functions. The tax is not directly imposed on the United States and, although the contractors pass the tax on to the United States they are not required by the Act to do so.
>
> 581 F.2d at 806.

The gross receipts statute broadly taxes receipts from not only the sale of tangibles, but from the sale of services as well, §7-9-3F NMSA 1978. Construction activities, such as Lembke's, are taxed as a service, §7-9-3K NMSA 1978 (App. D), and at trial it was conceded that Lembke's business is rendering construction services. I Tr. Pr. 163.

Lembke Construction Co., Inc. ("Lembke") is the taxpayer in this case. JA 22, 33. It is a New Mexico corporation doing business as a general building contractor, so licensed by the

State of New Mexico, and engaged in business state-wide. JA 57-58; Tr. Pr. 14, 129; Tr. R. 393. At the time it was building the Board's facilities for the Ramah Navajo School Board, Inc. (the "Board"), it was also under contract with the City of Albuquerque to construct a courts facility in downtown Albuquerque for $3.2 million, Tr. R. 393, and it had numerous subcontracts and material supply contracts on that job. Tr. R. 414-426. It is headquartered in Albuquerque, JA 58, Tr. Pr. 129, and its primary business focus is on commercial structures. *Ibid.*

Within New Mexico's borders are dozens of Indian tribes and pueblos. As of 1970, the Indians of New Mexico numbered approximately 73,000, and they beneficially own 6,822,906 acres of land within the state. Taylor, *The States and Their Indian Citizens*, U.S. Dept. Interior, BIA, 1972, p. 176 ("Taylor"). Indian economic and cultural development in this state is quickening; as it grows it becomes inextricably tied to the non-Indian economy of the region. Uranium and coal mining operations take those minerals from Navajo lands in western New Mexico. International oil and gas producers drill on the Jicarilla Apache Reservation in northern New Mexico. *Merrion v. Jicarilla Apache Tribe*, __U.S.__ (Nos. 80-11, 80-15, January 25, 1982). Texans ski and relax at the Mescalero Apache Tribe's Sierra Blanca ski resort, *Mescalero Apache Tribe v. Jones, supra*, and the Inn of the Mountain Gods, *Mescalero Apache Tribe v. O'Cheskey, supra*, in the south central part of the state. The all-Indian Pueblo Cultural Center is on 11.6 acres of Indian land near downtown Albuquerque. P.L. 95-232, 92 Stat. 31 (February 17, 1978).

The Ramah Navajo Reservation in west central New Mexico, where Lembke constructed the schools for the Board, is physically separated from the main Navajo Reservation in northwest New Mexico and northeast Arizona. The Ramah Navajos constitute one of three satellite Navajo Reservations in New Mexico, located approximately 50 miles southeast of Gallup. JA 32.

They are citizens of the United States and New Mexico, 8 U.S.C. §1401(a)(2), and are entitled to vote in state[1] and local[2] elections. They number approximately 1,400. JA 93. Despite their geographic isolation from the seat of state government, they have been the recipients of a substantial amount of state services, both direct and indirect, including public and higher education, tax and welfare benefits. They received a total of $390,000 in benefits from the state in 1977 alone, JA 87-94, for an expenditure of $280 per capita. The total benefits figure is substantially smaller than the total state expenditures for all Navajo Indians, because the Ramah Band is only a tiny fraction of the total New Mexico Navajo population.

All of the taxes involved in this case were on Lembke's receipts from its three construction contracts with the School Board,[3] covering the five-year period 1974-1978. JA 33. From the outset of planning and negotiating the project, the Board understood the construction cost included the gross receipts tax that the general contractor would have to pay.[4] JA-47-48. The Board's specifications for the contracts required that the gross receipts tax be included in a contractor's bid, JA 16, 58-59,

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[1] *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (S.Ct. 1962).

[2] *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (S.Ct. 1975).

[3] The contracts are listed and identified in Appendix A, *infra*.

[4] The construction architects who prepared the bid specifications themselves paid $24,000 in New Mexico gross receipts tax on their services for the Board which they by contract passed on to the Board as part of the architectural fees. JA 27; Tr. R. 37, 150-51. The Board initially sought a refund of this amount in the trial court, *ibid.*, but the claim was later abandoned.

60; Exh. D-3.[5] There were two bids on the project,[6] one from Lembke, and both bidders included the gross receipts tax in their bids in compliance with the bid specifications. JA 34; Tr. Pr. 319; Tr. R. 499-500. In fact all of Lembke's subsequent cost estimates on the remaining two contracts (see App. A) included the gross receipts tax as a project cost. Tr. R. 499-500. Lembke's usual bidding practice was to figure in the gross receipts tax on any New Mexico job as a cost of the project. JA 60. All Lembke's construction contracts with the Board expressly required Lembke to pay the gross receipts tax. JA 33. Lembke had paid gross receipts tax on its contract receipts, from 1974, when construction began, JA 54, to the completion of construction, and had regularly passed on the amount of the tax to the Board in its construction draws. JA 33-34. At some point before the second Lembke contract of July, 1977, the executive director of the Board questioned whether Lembke was liable for the gross receipts tax, Tr. Pr. 101, and a clause was put in the contract recognizing that the Board could litigate the issue and was entitled to any refund. Exh. P-35, art. 5.3; JA 13. Three years after construction began, and when the project was 75% completed, on December 12, 1977, Lembke and the Board filed an administrative request for refund of the tax they paid to date. Tr. R. 3. They filed their complaint for refund in the trial court in March, 1978. Tr. R. 7-9.

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[5] Para. 1Y of the General Requirements of the bid specifications, JA 148, contained in this Exhibit, prepared by the architects who were the agents of the Board, Tr. Pr. 168, provided:

> "All contractors . . . shall comply with provisions of New Mexico Sales and Use Tax Law and all amendments . . . and require all of their subcontractors to do likewise."

[6] See Appendix B, *infra*, for the buildings constructed in each phase of Lembke's work.

During construction Lembke issued New Mexico nontaxable transaction certificates to its subcontractors and material suppliers, Tr. Pr. 166, 174-176, the purpose of which is to prevent taxing construction services and materials twice by allowing subcontractors and material suppliers to deduct their sales to the general contractor from their gross receipts, §§7-9-51 and 7-9-52 NMSA 1978. Then only the general contractor's receipts will be taxed. *Ibid.* Use of the certificates and the deductions are not allowed, however, when the general contractor's receipts are not taxed, *ibid,* which Lembke understood. Tr. Pr. 174-76.

The Navajo Tribe furnished no financial assistance in building the Board's facilities. JA 33; Tr. Pr. 499. All of the funds for design and construction came from five annual Congressional appropriations to the Department of Interior totaling $9,136,000.[7] While the Tribe gave its "blessing" to the Board, Tr. Pr. 120, and authorized the Board on a yearly basis to secure federal funding for its operations directly under P.L. 93-638,[8] Exhs. P-9, P-11, JA 10-11, no further aid from the Tribe was forthcoming. No representative of the Tribe ever testified on behalf of the Board when it sought funding from Congress,[9] nor was the Tribe mentioned in any of the Congressional appropriations. Nor does

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[7] The appropriations, the first in 1972 and the last in 1977, are set out in Appendices B and C, *infra.*

[8] The Indian Self-Determination and Education Assistance Act of 1975, §25 U.S.C. §§250 et seq. (called in this brief the "Indian Self-Determination Act"). It permits Tribes and "tribal organizations" to "contract" with the BIA for services, i.e., to be given the money directly so that they can perform or buy the service that the BIA would have provided.

[9] Numerous Board members and three executive directors lobbied and appeared annually before appropriations committees of both houses from 1972 through 1979. Appendix C, *infra,* lists these hearings and cites each transcript year by year. References to these transcripts in this Brief will be to the year, the House or Senate and the page, the full citation for which will be in Appendix C, *infra.*

the Tribe make any significant contribution to the Board's operating budget.[10]

The Board is incorporated under New Mexico law. JA 31-32. It was incorporated as a funding mechanism, JA 41, Tr. Pr. 22, to qualify as a "tribal organization" under the Indian Self-Determination Act so that it, rather than the Tribe, could contract for and receive BIA monies for construction of the school. JA 33. The Board is not a political subdivision or agent of the Tribe. The Board, not the Tribe, owns the school buildings. Tr. Pr. 187. It secured the funding without the aid of the Tribe and it acted independently of the Tribe after receiving the funds. Tr. Pr. 112-13.

An Albuquerque BIA contracting officer approved Lembke's contracts, I Tr. R. 36, with the gross receipts tax included as part of the construction cost. JA 33-34, 58-59. The BIA had no role in the process of obtaining funds for construction. In fact, it consistently obstructed the Board's efforts to construct its schools. For this reason the Board bypassed the BIA and went directly to Congress for funding.[11] Tr. Pr. 71, 181,

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[10] The Board's total operating budget for 1979 was $7.2 million, $4 to $5 million of which was for school operations. Tr. Pr. 244. The remaining $2.7 million is to operate a health clinic and social service programs for the entire community. Tr. Pr. 243-44. The Tribe provided approximately $100,000 in "scholarships," Tr. Pr. 248-49, which would be 2.5% of the school operating budget, or 1.4% of the total operating budget. The rest was supplied by the federal government, Tr. Pr. 58, "contracted" by the Board under the Indian Self-Determination Act. See operating contracts between the Board and the BIA, Exh. P-38, JA 13.

[11] The record of Congressional testimony by Board members, see App. C, is filled with reported instances of BIA footdragging and inaction. The executive director of the Board even stated at trial that the Phase III appropriation of $2.062 million, see App. B, was made only because the BIA was *not* involved (other than as the "contracting" conduit to the Board, see pp. 25-26, *infra*). JA 45.

323-325. It then "contracted" with BIA to obtain the funds under the Indian Self-Determination Act. See App. A. The BIA did not exercise any substantive regulatory control over the Board, Lembke, or the architects. JA 42-43. Before construction began the Board simply notified the BIA which bidder it had selected and with which it was negotiating. JA 43; Tr. Pr. 84-85. During construction the BIA was merely the passive recipient of selected design and construction papers; there was no input or objection from the BIA. JA 42-43. Other than an equal opportunity employment clause, Lembke was not required by the BIA or the Board to include any particular provisions in its subcontracts. Tr. Pr. 172.

The Board has been operating the new school facilities since 1975.[12] JA 54. Its students number approximately 450. JA 35. The quality of the educational services it provides is quite good, JA 77, and the schools are a model of what can be done under the Self-Determination Act. Tr. Pr. 92-93. Because the school was built, the dropout rate has gone from 75% to around 5%.[13] Construction of the schools has also created employment in the Ramah community and upgraded it in significant ways.[14] Although not all the facilities that the Board wanted could be built, there was no particular building or facility that could have been built but for the state tax.[15] The

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[12] It actually has been operating its own elementary school and high school since 1970, first in leased buildings in Ramah and then at Pinehill beginning in 1975. JA 68.

[13] Testimony of the Board's executive director, 1978 Senate Test., p. 30, 1978 House Test., p. 168.

[14] *Ibid.*

[15] The testimony of the former executive director of the Board was: Q. ". . . [A]nd there was not a particular building that you can say we couldn't build simply because of the tax, is there?" A. ". . . [N]ot because of the tax, no." JA 56.

Board had to cut back on its projected budget for a number of reasons, among them because the architect overestimated what could be built with available funds, JA 55, because inflation greatly increased construction costs, *ibid.* and because Congress did not appropriate all funds requested. See App. C.

New Mexico did not deny educational opportunity to Ramah Navajos. Although the old high school at Ramah operated by the Gallup-McKinley County School District was closed in 1969 due to small enrollment, the District did provide bus service for high schoolers to nearby Zuni High School. Exh. P-43; JA 14, 124-127. Litigation over the school closing in state court commenced after the BIA and local school districts refused to reopen the school, Tr. Pr. 51-52, and the litigation ultimately focused on whether the bus routes the District did offer should be extended beyond the pickup points in Ramah. Tr. Pr. 20-21, 53, 220; Exh. P-41, p. 30. It was impossible to extend bus service because of the poor condition of roads in the Ramah area. JA 133 ff.; Tr. R. 42; Exh. P-43, JA 14, 124-127.

SUMMARY OF ARGUMENT

The Court should refine the "infringement test" established 23 years ago in *Williams v. Lee*, 358 U.S. 218 (1959) to resolve claims of infringement of tribal sovereignty. It should adopt the "legal incidence test" that has worked well to determine when state and local taxes infringe on the sovereignty of the United States. Application of the test to Indian-state disputes would significantly clarify this area of the law and may perhaps even end the case by case litigation that has, as one member of the Court characterized it, "plagued" this Court for a number of years. In this case the legal incidence of New Mexico's gross receipts tax is on the non-Indian construction contractor. The infringement claim is consequently without merit. If the Court

adopts the legal incidence test, New Mexico's tax would still be subject to scrutiny under the preemption test, for preemption is a second and separate requirement.

There is no infringement of Navajo sovereignty, even under *Williams v. Lee.* The Board lobbied Congress and appeared year after year to obtain the construction funding from the Congressional Appropriations committees. The Board received no construction funds from the Navajo Tribe; all of the $9.1 million spent for construction came from Congress in annual Interior appropriations. It received the blessing of, but no real support from, the Tribe in securing the funds from Congress. Even after construction the Board receives less than 3% of its operating budget from the Tribe, the lion's share coming from the federal government through "contracting" under the Indian Self-Determination Act. None of the construction funds went to the Tribe, none of the constructed buildings are owned by the Tribe, the Board operates separately and independently of the Tribe, and the Tribe itself permits the application of state attendance laws to schools on its reservation. The State is also not taxing "value created or generated on the reservation" by a tribe. The tax did not interfere at all with construction, for the Board actually received approximately $1 million more than it originally requested from Congress and its original request included the New Mexico gross receipts tax as part of the construction cost. Also, the Board spent over 14% of all construction appropriations just to administer the construction, which was 10% more than it told Congress it could do it for when it originally requested funding. The Board also used part of the school construction funds to build a health clinic for the entire community, a diversion from its school construction needs. Buildings the Board says couldn't be built because of New Mexico's tax were specifically denied appropriations by Congress, and in any case would have cost far more than the amount of the tax. The school's other shortcomings the Board

now says are caused by the state tax were never brought up in repeated Board appearances for more funding before committees of Congress after construction of the buildings was finished. Congress' and the Board's actions, not the State's determined what buildings the Board was authorized to build. The Board knew of the gross receipts tax in advance, budgeted construction to include it, and, as discussed in the following paragraph, passed the economic burden of the tax to Congress as effectively as any retail merchant would do.

The Board's case for preemption is totally unsupported by the case law and by the record of this case. The Congressional appropriations for the school construction were based on the Board's own construction funding requests that included the New Mexico gross receipts tax as part of the construction cost. Time and time again the Board sought funding from House and Senate committees, each time with the tax included as part of the requested construction costs. See App. C, *infra.* Furthermore, the BIA approved the Board's construction program budgets that included the gross receipts tax as part of the price of construction. In the face of these approvals it can hardly be said that the federal government has in some way preempted the gross receipts tax. The preemption inquiry in this case is whether Congress has completely regulated building construction on a reservation, because it is the gross receipts from that construction activity that New Mexico seeks to tax. Were the focus, though, on Indian education, as the Board contends, the Indian Self-Determination Act supports and recognizes state educational facilities for Indians, and it supports and funds state school construction, both on and off reservations, negating the Board's preemption notions. BIA regulations cited by the Board are not a part of a preemptive regulatory scheme. They merely regulate how a Tribal organization goes about "contracting," under the Indian Self-Determination Act, with the BIA to take over functions and monies of the BIA. They did not regulate how,

when, or where this taxpayer, Lembke, was to perform the construction work. Finally, that there is no case for preemption is further highlighted by the fact that in this case, unlike *White Mountain*, both the taxpayer and the Indian Tribe derive substantial benefits and services from the state. And unlike the taxpayer in *White Mountain*, the taxpayer in this case carries on business state-wide. It has enjoyed the substantial privilege of doing business in an "organized society," as well as receiving many individual benefits, such as use of New Mexico roads, police protection, use of the court system, and full state and municipal services. These privileges are funded from state general revenues, revenues generated by the gross receipts tax, among others. New Mexico's interest in being able to tax Lembke is thus quite substantial and the tax should be sustained.

This Court lacks jurisdiction of the issue of the preemption of New Mexico's tax by the Indian trader statutes, as this issue was never raised in or decided by the courts below. Nevertheless, the federal Indian trader statutes, 25 U.S.C. §261-264 and their regulations, likewise do not preempt the imposition of New Mexico's gross receipts tax on the construction services performed by Lembke. This is because Lembke's activities do not constitute Indian "trading." The statutes and their legislative history make it clear that the type of activities regulated are retail transactions in goods and merchandise which occur at trading posts or with itinerant peddlers of merchandise, not the sale of a construction service only, as Lembke was doing. Any regulation under the Indian trader statutes purporting to regulate a person whose sole activity is a service is *ultra vires*. Thus, when the seller's sole activity is providing a multimillion dollar construction service approved by Congress and the BIA, the activity is simply not covered by the federal Indian trader statutes.

Finally, neither the New Mexico Enabling Act nor the Indian Commerce Clause bar New Mexico's tax. The former argument

was laid to rest many years ago by cases holding that it is a disclaimer of proprietary interest only. The latter was soundly rejected by this Court in the recent *Colville* case.

I. THE COURT SHOULD EXPRESSLY ADOPT THE "LEGAL INCIDENCE" TEST TO DETERMINE WHETHER A STATE TAX INTERFERES WITH INDIAN SOVEREIGNTY.

Over the years the Court has fashioned the test of "legal incidence" to determine when a state tax infringes on the sovereignty of the United States of America.[16] In *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), this Court upheld the application of a non-discriminatory state gross receipts tax to the receipts of a federal contractor. So long as the legal incidence of the tax fell on the contractor, the fact that the economic burden passed to the United States did not bar the tax. Subsequent decisions of this Court[17] have strengthened that holding. For instance, in *Gurley v. Rhoden* this Court held that the legal incidence of a tax is on the vendor even though "the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise." 421 U.S. at 204.

It is settled that the legal incidence of New Mexico's gross receipts tax is on the seller of goods and services. *United States*

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[16] For the history of the rule, see Mahoney, "Federal Immunity from State Taxation: A Reassessment," 45 U. Chi. L. Rev. 695 (1978), and Tribe, "Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues In Controversies About Federalism," 89 Harv. L. Rev. 682, 700 (1976).

[17] E.g., *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968); *Gurley v. Rhoden*, 421 U.S. 200 (1975); *United States v. County of Fresno*, 429 U.S. 452 (1977).

v. State of New Mexico, 581 F.2d 803 (10 Cir. 1978). New Mexico is entitled to levy its tax on federal contractors doing business on federal reservations even though the United States by contract reimburses the contractor for the amount of the tax. *Ibid.* Thus, had the BIA instead of the Board contracted with Lembke in this instance, the tax would be permissible under the legal incidence doctrine. *Cf., Commonwealth Edison Co. v. State of Montana,* ____U.S.____, (No. 80-581, July 2, 1981), where a state severance tax on minerals mined on federal lands was held valid even though it reduced the "economic rents" to the United States.

Application of the legal incidence doctrine to resolve this appeal is not without considerable support in the recent Indian case law of this Court. In *Colville*[18] and in *Moe*[19] state taxes were sustained "because their legal incidence fell on the non-Indian purchaser." *Colville,* 100 S.Ct. at 2080. And Justice Marshall, speaking for the majority in *White Mountain Apache Tribe v. Bracker,* 100 S.Ct. 2578 (1980), noted:

> Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted as *Moe v. Salish & Kootenai Tribes* . . . makes clear.
>
> 100 S.Ct. at 2587.

Justice Stevens in the same case said:

> A tax is not invalid simply because a non-exempt taxpayer may be expected to pass all *or* part of the cost of the tax through to a person who is exempt from tax. See *United States v. City of Detroit* . . .
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> 100 S.Ct. at 2591 (Dissenting op.).

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[18] *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 100 S.Ct. 2069 (1980).

[19] *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976).

To the same effect are Justice Stewart's comments in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 100 S.Ct. 2592, 2598 (1980) (Dissenting op.).

There are at present two separate proofs to be made before a state's tax may be applied to a non-Indian on a reservation: first, it must not infringe on Tribal sovereignty, and second, it must not be preempted by the United States. *White Mountain, supra*, at 2538. The "infringement on sovereignty" test is clearly a standard in need of revision, for there are no objective criteria in its formulation and its only real content has come simply from a case by case inclusion and exclusion of sets of facts. Replacing it with the legal incidence test would go a long way toward clarifying when and how Tribal sovereignty has been infringed, for there would be the full body of federal intergovernmental immunity law from which to draw, because the test has worked over the years, and because tribes would receive the full measure of protection afforded the United States. Thus, it would end the anomaly of Indian tribes being more sovereign vis-a-vis the states than the United States itself. It would also harmonize with and continue the rules laid down in this Court's recent holdings, noted above, and in the not so recent ones as well, such as *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), where a state tax on a non-Indian lessee of Indian lands was upheld, with repeated references to the federal law on intergovernmental immunity.

The need for predictability in this field is great:

> . . . I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years.
>
> *Colville*, 100 S.Ct. at 2093 (Rehnquist, J.).

Express adoption of the legal incidence rule would be a long stride toward the establishment of a reasonable degree of certainty in this field.

II. NEW MEXICO'S GROSS RECEIPTS TAX DOES NOT INFRINGE ON THE RIGHT OF NAVAJOS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

Even under the traditional "infringement" test of *Williams v. Lee, supra,* the gross receipts tax cannot be said to interfere with or inhibit the workings of Navajo tribal government. Other than permission to locate the school on the Ramah Reservation, the Board received little moral support from the Tribe in Window Rock. See p. 6-7, *ante.* In its quest for construction funding from the federal government it received nothing from the Tribe other than paper permission to be a "tribal organization" to receive self-determination money. And it received absolutely no monetary support for construction from the Tribe.[20] *Ibid.* None of the construction funds from the federal government came to the Tribe and it owned none of the buildings constructed by the Board. *Ibid.* Only an insignificant part of the Board's operating budget comes from the Tribe. See fn. 10. Other than that, the Board operates completely independently of the Tribe. Moreover, the Tribe permits the application of New Mexico's compulsory school attendance laws on the reservation, 10 Nav. Tr. Code §103, with the approval, or perhaps at the initiative, of Congress. 25 U.S.C. §231.

Significantly, the entire project was built not with tribal funds but solely with federal appropriations. New Mexico's

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[20] Despite the fact that funds available for expenditure by the Tribe were, in 1979 for instance, approximately $100 million. Annual Budget of the Navajo Nation, FY 1979, Window Rock, Az.

tax thus does not interfere with or reduce the yield from "value generated on the reservation" by a Tribe,[21] a significant circumstance noted by the Court in *Colville* in sustaining Washington's tax, the legal incidence of which also fell on non-Indians.

Not even the economic burden of the tax was on the Board, for it was able to effectively pass it on to the United States from the outset. The Board planned the school facilities on the assumption that the tax was to be paid by the contractor and passed on to the Board, and Congress also funded the project on that assumption. See p. 21-22, *infra.* In this way the Board was able to effectively pass the economic burden of the tax to the United States as any retail merchant or contractor would do in contracting for government work.

It is the Board itself that bears the responsibility for any alleged shortfall in construction funds for contracting.[22] It represented to Congress in 1973 that the BIA wanted too much – approximately 10% – of the construction funds to administer the project, saying that it could do the same thing for 4%.[23]

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[21] *Colville,* at 156-57; *Merrion v. Jicarilla Apache Tribe,* ____U.S.____, 50 L.W. 4169, Jan. 25, 1982.

[22] Actually the Board received more than it initially asked Congress for. In 1974 it told Congress that although the BIA estimated the project would cost $12-15 million, "our design and construction figures come down to $8 million to complete what is needed" (1974 House Test., p. 265), and that "the entire POR [project] can be completed for $8.3 million." *Id.,* at 263. And that $8 million included the gross receipts tax. See pp. 19-20, *post.* The Board finally ended up with $9.1 million, and later requested another $14.7 million. 1979 House Test., pp. 386-388.

[23] Testimony of the Board's executive director, 1973 Senate, p. 3617: "To show you that the coyote is still around, he has already wanted to rip off $310,000 of that [$3 million] for what is termed as the administrative cost. We can do that administration for 4 percent." See also 1973 Senate Test., p. 3620.

In actuality the Board did it for much, much more: it consumed $1.3 million or 14.5% of all the construction funds made available by Congress, presumably to administer Lembke's work.[24] In addition, the Board built a health clinic staffed by a medical doctor, dentist, and nurses, and fully equipped to serve the entire community. Tr. Pr. 57, 244, with some of the appropriations Congress intended for "construction of school facilities and school equipment." 87 Stat. 1073, 88 Stat. 810. Moreover, the Board's executive directors and members who testified before House and Senate committees in 1974 or 1975 to request Phase II construction funding, never mentioned a health care facility. They did ask for a laundry, bus garage, dormitories, housing, trailer park, cafeteria and administrative offices.[25] 1974 House Test., p. 265; 1975 House Test., pp. 275-277. Just how much these two expenditures totaled is impossible to say, but the amount of state gross receipts tax pales in comparison.[26]

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[24] $9,136,000 was given to the Board, but only $7,818,402 was spent on construction contracts to build, design and equip the school. See App. A. Thus, $1,317,598 or 14.42% of the funds was spent to administer construction.

[25] And they did ask for $355,000 in operating funds to run the clinic in FY 1978 after it had been built. 1977 House Test., p. 601.

[26] The operating costs for the school are also extravagant. For an enrollment of 450 pupils, JA 35, the operating budget is between $4 and $5 million. Tr. Pr. 58. That amounts to a per pupil cost of $10,000 per year, which is five times the average per pupil cost of $2,103 for New Mexico public schools with enrollments up to 1,000. Statistics 1978-79, Public School Finance Division, Dept. Finance and Administration, State of New Mexico. The Board's per pupil construction cost was also a hefty $20,222, which was approximately twice the average per pupil cost for state and BIA schools of comparable size. Statistics, State of New Mexico, Dept. Fin. and Admin., Public School Capital Outlay Council, Santa Fe, N.M. (1982).

The Board says that it still needs a cafeteria, classrooms, administrative offices and landscaping, and attempts to attribute the lack of these facilities to the state's tax. Bd. Br. 7. Each of these buildings, it should be noted, would have cost more than New Mexico's tax. For example, for the cafeteria the Board requested on various occasions $1 million, $1.1 million, $1.2 million and $1.7 million to build it, and each time it did so, Congress refused to appropriate it.[27] In any case, there is a functioning cafeteria on the school premises, JA 56, although it is not a separate building. As for additional classrooms, the Board never suggested in testimony to Congress after Phase I, during which the classrooms were built, that more were needed.[28] The Board does have administrative facilities in portable buildings, JA 57, and again the Board never asked Congress for such a separate permanent building for administrative facilities, even in its last request to Congress.[29] It then wanted $14,728,311 over and above the $9,136,000 that it had already received,[30] the size of the request indicating that the Board had covered all its real needs.

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[27] See App. C., *infra.*

[28] See 1976, 1977 and 1978 House and Senate Test., App. C.

[29] *Ibid.*

[30] 1979 House Test., pp. 395-397. The executive director of the Board, in asking for $3.3 million for staff housing, $2.7 million for an auditorium, $1.7 million for a cafeteria, $5.3 million for dormitories, and $1.6 million for roads, told the Subcommittee: "The school facility is only half completed at this time, and we believe that unless we are given funds to complete the school construction project, the treaty of 1868 . . . goes unmet, the spirit of 93-638 is stalled and we are not able to determine our future destiny. Most importantly, the equal education of our students is stalled because we won't have adequate facilities to house and teach our students." *Id.* at 391. Congress failed to appropriate any funds for the Board.

To ascribe to New Mexico's tax the supposed unfinished state of the school facilities is to ignore the dynamics of the funding process. Year after year the Board came back to Congress for more money. See App. D. Each time Congress gave the Board less than it asked for, forcing the Board to reorder its construction plans and to prioritize its budget requests.[31] And the very same construction costs that it projected to Congress included New Mexico's gross receipts tax. See pp. 19-20, *infra*. It was Congress that determined the extent of the school facilities the Board was to receive, not the State of New Mexico. The state's tax posed no obstacle whatsoever for the Board's construction,[32] and the infringement claim should be rejected.

III. CONGRESS HAS NOT PREEMPTED NEW MEXICO'S GROSS RECEIPTS TAX ON THE RECEIPTS OF THE CONSTRUCTION CONTRACTOR.

The preemption contentions in this case are ill-founded, for Congress has no pervasive scheme of regulation of the activity of building construction on a reservation.

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[31] See 1976 Senate Test., p. 2051 and funding requests for 1975-1978, App. C.

[32] In fact even after the Board's executive director questioned whether Lembke was liable for the tax, bringing it up to the Board's attorney in 1976 or early 1977, Tr. Pr. 101, the Board never uttered a word of the alleged infringement of tribal sovereignty and supposedly disastrous diminution of construction funds to the Congressional committees it returned to for funding time and time again. See App. C.

A. Congress and the BIA were presented with construction budgets that included the gross receipts tax and they approved them.

The Board included New Mexico's gross receipts tax in the construction costs that it presented to Congress on numerous occasions over an eight-year period. See App. C, *infra.* This is evident from the fact that the dollar construction cost estimates and requests the Board gave to Congress for Phase I were prepared by the Board's architects,[33] the same architects who prepared the bid specifications that required Lembke and other bidders to include gross receipts tax in the project cost[34] and who themselves paid gross receipts tax on their own architectural services.[35] And not only did the Board know from the "outset" that construction costs included gross receipts taxes, JA 47-48, but also the construction figures its executive director[36] presented to Congress year after year, obviously included gross receipts tax. For example, Lembke's contract price for the instructional media center it built in Phase III included gross receipts tax.[37] The $2,062,000 Congress gave to the Board for the instructional media center in 1977 was exactly what the Board estimated that facility would cost in

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[33] Testimony of the Board's executive director, 1973 Senate Test., p. 3618, 1974 House Test., p. 265.

[34] See text accompanying fn. 5, *ante.*

[35] See text accompanying fn. 4, *ante.*

[36] This was Mr. Manuelito. He was also the witness who testified at trial that gross receipts tax was included "from the outset." JA 47-48. He appeared before House and Senate committees seeking funds on behalf of the Board on eight occasions over the eight-year period, each time with dollar construction costs attached to specific proposed buildings. Most of the requests were also prioritized by building. See App. C, *infra.*

[37] JA 33-34, 54; Tr. R. 499-500; Exh. P-36, JA 13.

testimony to Congress.[38] Moreover, after the Board's first contract with Lembke in 1974 (see App. A), a document that expressly included the gross receipts tax as a cost, the Board returned to Congress time after time (see App. C) without ever saying a word to change its original budget assumption, namely, that from the "outset" the figures it gave the House and the Senate included the gross receipts tax as part of the construction cost estimates.

The BIA approved inclusion of the tax as part of the project cost. It contracted with the Board five times based on the Board's estimates of construction costs which included the gross receipts tax. Appendix A, *infra.* It also approved Lembke's contracts which expressly obligated Lembke to pay the tax.[39] If anyone at the BIA ever thought the tax interfered with one of its regulatory schemes, or that it violated tribal sovereignty, he never expressed it.

B. The focus of the preemption inquiry in this case should be on construction because that was the contractor's taxable activity.

The weakness of the preemption contention in this case is obvious from the Board's attempt to switch the subject of regulation under consideration from construction to education. The Board would have the focus be on the use to which the

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[38] The Board asked for an additional $9.5 million which was not appropriated. 1976 House Test., pp. 494-495; 1976 Senate Test., p. 2055. The additional requests were staff housing – $2.524 million, a cafeteria – $1.254 million, dormitories – $3.763 million, and an auditorium – $2.007 million. *Ibid.* But the Board's "first priority" was the $2.062 million instructional media center, 1976 Senate Test., p. 2051.

[39] JA 33.

buildings are put, not on the taxable activity of construction. This approach, however, besides being unworkable,[40] is also a radical departure from the preemption inquiries in *Warren Trading Post*[41] and *White Mountain, supra.* These cases looked solely to the taxpayer's activity triggering the state tax, not to the activity of the consumer purchasing the taxpayer's goods or services. The Board's theory, if applied to the facts of *White Mountain,* for example, would disregard the logger's taxable activity and zero in on the use to which the logs are put. That is not this Court's test of preemption. New Mexico is taxing construction receipts, not education; Congress has not regulated construction[42] and has thus not preempted the tax.

C. Congress has not preempted Indian education; on the contrary, it has recognized the state's role in Indian education and supported state construction of Indian schools, even on reservations.

The Board recites a number of federal statutes from which it wishes the Court to conclude that Indian education on the reservation has been preempted. While there is no doubt that Congress, as trustee, has been long concerned about the education of its "ward," these statutes do not add up to a framework, scheme or plan for education that will be interfered with by New Mexico's tax. The Johnson-O'Malley Act,[43] which the

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[40] If the focus is not on the taxable activity but on the use to which the product of the activity is put, then, for example, any state tax on a wholesaler of goods supplying an Indian "trader" on a reservation, would be preempted.

[41] *Warren Trading Post Co. v. Arizona Tax Comm'n.*, 380 U.S. 685 (1965).

[42] See p. 25-26, *infra.*

[43] 25 U.S.C. §§452-457.

Board somehow finds supportive of its argument, Bd. Br. 27, actually provides funds to the states for Indian education. It was passed in order to have the states take over the burden of educating Indians, enabling the federal government to transfer large numbers of Indians to state schools.[44] As of 1970, 68% of all Indian children were enrolled in state schools[45] both on and off reservations and 42% of Indian children in New Mexico were being educated in state schools.[46] The Indian Self-Determination Act in Title II[47] both recognizes and supports local school districts of a state educating Indians on and off reservations,[48] a circumstance acknowledged by even the Board's counsel.[49] The State of New Mexico operates schools on Indian Reservations. Tr. Pr. 321. It has a significant role[50] in Indian education, as is also detailed in *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N.M. 1973) and in *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (S.Ct. 1975). Far from there being any Congressional intent to exclude the states from Indian education, the very opposite has been true, and it has

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[44] See Gross, "Indian Self-Determination and Tribal Sovereignty: An Analysis of Recent Federal Indian Policy," 56 Tex. L. Rev. 1195, 1203, 1212 (1978) (cited as "Gross), and see Szasz, *Education and the American Indian*, University of New Mexico Press, 1974, pp.89-122 ("Szasz").

[45] Taylor, p. 81.

[46] *Id.* at 177.

[47] This actually is the Education Assistance Act. In any case, it is Title II's provisions authorizing "contracting" for BIA programs and the BIA regulations under that title that lie at the heart of the Board's preemption notions. See Bd. Br., 27-29.

[48] 25 U.S.C. §458.

[49] Gross, at 1200-1201.

[50] For the states' role generally, see Final Report to the American Indian Policy Review Comm'n, Task Force Five: Indian Education, at 411-413 (1976); Szasz, pp. 181-187; Taylor, pp. 30, 81-86.

taken explicit form as recently as 1975. In that year Congress passed the Indian Self-Determination Act, including a provision expressly supporting school construction by state education agencies and local school districts, 25 U.S.C. §458,[51] and the legislative history of the Act specifically refers to this support as one of the purposes of the legislation.[52]

Nor do the Interior regulations the Board relies on, 25 C.F.R. Part 271 and 25 C.F.R. Part 274,[53] have anything to do with Lembke's substantive construction activities. They merely detail the procedures by which tribes may apply for contracts with the BIA to carry out BIA programs with funds that would have been the BIA's. The limited function of the regulations is made clear by the regulations themselves: Part 271's purpose is

> . . . to give the application and approval process for non-profit contracts with the Bureau under section 102 of Title I of the Indian Self-Determination and Education Assistance Act. . .
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> 25 C.F.R. §271.1(a)

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[51] Section 458(a) reads: "The Secretary is authorized to enter into a contract or contracts with any state agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian Reservation or other lands held in trust by the United States for Indians. . ."

The Board's counsel recognizes that "although the Act purports to strengthen tribal governments, it leaves significant control over a vital area of Indian life – education – in the hands of non-Indian controlled education agencies and local public school districts." Gross at 1209.

[52] House Report No. 93-1600, 1974 U.S. Congr. & Adm. News 7780-82.

[53] Authorized respectively by 25 U.S.C. §450f and by 25 U.S.C. §§458 and 458d, all provisions of the Indian Self-Determination Act. The Board also relies on 25 C.F.R. Part 31, but this is merely a collection of BIA regulations governing its own education functions.

Part 274's purpose is:

> . . . to give the application and approval process for obtaining a contract or services from the Bureau for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations under . . . Title II . . .
>
> 25 C.F.R. §274.1

To contend that these regulations under the Indian Self-Determination Act are a legislative scheme for school construction akin to the one governing the harvesting of timber in *White Mountain* is quite misleading and incorrect. The thrust of the Indian Self-Determination Act was to free Indian tribes of paternalistic federal regulation and to do away with restrictive and excessive BIA control.[54] In effect Congress was taking a first step in "deregulating" and "demonopolizing" the delivery of governmental services to Indians. It authorized Indians to obtain the money that the BIA was given for their benefit. To say, as the Board does, that the very legislation deregulating Indian services is a regulatory scheme preempting state tax, is to argue nothing more than that simply because there is legislation on the books directed toward Indians, state jurisdiction is preempted. This contention has previously been presented to and rejected by this Court. In *Colville* the Tribes cited the same Indian Self-Determination Act and other statutes directed at aspects of the well being of Indians as a basis for preemption of state tax. The Court, however, ruled that while the statutes evidenced "varying degrees of Congressional concern with fostering tribal self-government and economic development," they were not a firm basis for preemption. 100 S.Ct. at 2082. The same is true in this case.

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[54] House Report No. 93-1600, 1974 U.S. Congr. & Adm. News 7775-76, 7780-83; Remarks of Congressman Meeds, one of the sponsors, 120 Cong. Rec. 414045 (Dec. 19, 1974).

Finally, the record of BIA regulatory and supervisory control over Lembke's construction is very clear in this case: there just wasn't any. See p. 7, *ante*. The BIA was merely the passive recipient of occasional construction papers, exercising no regulatory function of any significance on this project at all.

D. New Mexico has provided the taxpayer and the Ramah Navajos with benefits that justify assessment of its tax.

This is "a case in which the state seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall."[55] New Mexico does provide Lembke with substantial state services. In contrast to the solely on-reservation activity of Pinetop in the *White Mountain* case, Lembke is headquartered in Albuquerque and does substantial business statewide. The general and administrative office functions of its contracts with the Board were performed in Albuquerque, not on the reservation. Its subcontractor dealings, procurement of materials, and payroll and administrative work were done in Albuquerque. It thus received significant benefits from New Mexico, and that is enough to sustain its interest to tax. Cf., *Commonwealth Edison Co. v. State of Montana*, 49 L.W. at 4961. The burden was on the Board to prove a lack of benefits and services to Lembke, something that it never even attempted. It was not up to the state to show the contrary, for the rule is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption. *Norton v. Dept. of Revenue*, 340 U.S. 534 (1957); *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 279 U.S. 306 (1928).

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55 *White Mountain, supra*, 100 S.Ct. at 2586.

Beyond this support for New Mexico's power to tax, however, are the substantial benefits and services the state has extended to the Ramah Navajos themselves, the extent of which is clear in the record. State education, welfare, tax and indirect benefits to the Ramah Navajos amounted to $280 per Ramah Navajo in 1977.[56] New Mexico has obviously more than amply demonstrated the interest it has in being able to tax Lembke, and the balancing of interests inquiry mandated by the *White Mountain* case heavily favors the state.

IV. NEW MEXICO'S GROSS RECEIPTS TAX IS NOT PREEMPTED BY THE INDIAN TRADER STATUTES.

This Court lacks jurisdiction under 28 U.S.C. §1257(2) to review this question because this issue was not raised in or decided by the New Mexico courts below. Although the Board raised preemption arguments with regard to other federal enactments (see Point III, ante), the issue of preemption by the federal Indian trader statutes and regulations is raised for the first time before this Court. As this Court has repeatedly held, the failure to properly raise an issue below deprives this Court of jurisdiction over the question. *Safeway Stores v. Oklahoma Grocers,* 360 U.S. 334, 342 n. 7 (1959); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1968); *Hill v. California,* 401 U.S. 797, 805 (1968); *Tacon v. Arizona,* 410 U.S. 351, 352 (1972).

Even on the merits, the Board's contention is wrong. New Mexico's gross receipts tax on Lembke's construction receipts is not preempted by the federal Indian trader statutes, 25 U.S.C.

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[56] The Board has quibbled with the *amount* of benefits but not the underlying fact that they were furnished.

§§261-264. Although this Court ruled in *Warren Trading Post, supra,* that Congress had fully taken in hand the business of Indian "trading" on reservations and that no room remained for state laws imposing additional burdens on traders, Lembke's activities in this case do not come within the ambit of the Indian trader statutes. This is because Lembke's construction activities do not constitute Indian "trading" within the meaning of the Indian trader statutes.[57]

The Indian trader statutes and their extensive legislative history show clearly that these statutes were drafted in contemplation of the types of retail transactions in goods which could reasonably be expected to occur at Indian trading posts or with itinerant peddlers of merchandise. For instance, 25 U.S.C. §261 provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the *kind and quantity of goods* and the prices at which such *goods* shall be sold to the Indians. (Emphasis added.)

Section 262 of Article 25 concerns the authority of the Commissioner of Indian Affairs to regulate those engaged in Indian trading. Although no mention of "goods" is made, the type of activities which Congress contemplated in the term "trade with Indians" is indicated by the provisions of 25 U.S.C. §261. This conclusion is fortified by the well-settled principle of statutory construction that statutes concerning the same subject matter are to be read *in pari materia. Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954). Further support is also found in 25 U.S.C. §§263 and 264. Section 263 provides:

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[57] Lembke never sought or received a trader's license, nor did the BIA require Lembke to obtain one. That this issue is being raised at this late date shows that it is an afterthought.

> The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of *goods,* or *of any particular article,* into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. (Emphasis added.)

Section 264 provides in relevant part:

> Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to *introduce goods,* or to trade therein, without such license, shall forfeit *all merchandise* offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . . (Emphasis added.)

Thus, the language of the Indian trader statutes themselves makes it clear that Congress never intended them to cover the activity in this case, a multi-million dollar construction project, funded and approved by the federal government. That sort of business activity is simply not the type of activity in which Indian traders have traditionally engaged. As this Court stated in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978) at 206:

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and those who drafted them. (Citation omitted.)

The legislative history of the many congressional enactments regulating Indian trade since 1790[58] points to this conclusion. This legislation and the testimonials given to Congress are replete with references to goods,[59] merchandise, and other forms of tangible personal property, such as horses,[60] liquor,[61] weapons,[62] instruments of husbandry,[63] articles of clothing,[64] skins and furs,[65] and cooking utensils.[66] Without unnecessarily quoting from the Acts of Congress and the legislative history surrounding those Acts, suffice it to say that there is absolutely nothing to be found which would indicate that Congress contemplated Indian trading to include the rendition of services only.

The Board relies on *Rockbridge v. Lincoln*, 449 F.2d 567 (9 Cir. 1971), as implying that the trader statutes do cover services. Bd. Br., 34. Apparently the Board refers to credit transactions, in the form of loans, pawns and sales of merchandise on open account, which took place at trading posts on the Navajo Reservation. These credit transactions, however, occur in the context of the post's normal business of buying and

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58 Act of July 22, 1790, 1 Stat. 137. The full list of Congressional enactments regulating Indian Trade is listed in Cohen: Handbook of Federal Indian Law (1942), pp. 348-351, fn. 2.

59 E.g., Annals of Congress, 4th Congress, 1st Sess., 1796-97, pp. 230, 240, 242, 284 and 286.

60 Act of March 1, 1793, 1 Stat. 329, §§6, 7.

61 Act of March 30, 1802, 2 Stat. 139, §21.

62 Act of April 18, 1796, 1 Stat. 452, §7.

63 Fn. 59, *ante*.

64 Fn. 61, *ante*.

65 Fn. 61, *ante*.

66 Act of March 3, 1799, 1 Stat. 743, §9.

selling goods and merchandise. The practice of engaging in these minor credit transactions incidental to the sale of the trader's merchandise is a traditional practice commonly engaged in by trading posts throughout our history.[67] This was because Indians, isolated on reservations far from cities and commercial centers, went to the only commercial center available, the trading post, when banking transactions, such as loans and check cashing, were needed. Such credit transactions obviously fall within the generally accepted view of what constituted Indian trading. They are ancillary to the business of Indian "trading," further strengthening the state's position on this question.

The Board would now have this Court construe the federal Indian trader statutes to cover commercial activity of any kind occurring on an Indian reservation, sweeping up the mining of coal and other minerals, and the severing of oil and gas, and turning reservations into tax havens immune from the reach of state taxes. These "enclave" notions have been firmly rejected in *Colville*, and *Moe*, and not even in *Central Machinery* or *Warren Trading Post* did this Court give the trader statutes such a broad sweep. The only commercial transactions to which this Court has applied the trader statutes are ones which have involved the sale of *goods* to Indians or an Indian tribe. *Warren Trading Post, supra; Central Machinery Co., supra.* In fact, in *Central Machinery*, this Court stated that the Indian trader statutes were enacted "to protect Indians from becoming victims of fraud in dealing with persons selling *goods*." 100 S.Ct. at 2596

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[67] That Congress has long recognized that traders were involved in extending credit to Indians is evidenced by the Act of June 21, 1906, 34 Stat. 325, 366, which made it unlawful for traders on the Osage Reservation to extend credit to an individual Indian in excess of 75% of the next quarterly annuity to which the Indian was entitled. See *Tinker v. Midland Valley Co.*, 231 U.S. 681 (1914).

(Emphasis added). Although Lembke does indeed sell construction materials to the Board, it does so only in the context of performing the service of constructing a building into which the materials are incorporated. (JA 61).

The implication of the *White Mountain* case is also supportive of the conclusion that the trader statutes do not cover every commercial transaction on an Indian reservation. In that case the non-Indian contractor, Pinetop, was performing a service, the cutting and hauling of tribal timber, and this Court relied not upon the Indian trader statutes, but upon the federal regulations governing the harvesting and management of Indian timber in striking down Arizona's taxes. This was in spite of the fact that under the reasoning of *Central Machinery* argued concurrently and decided the same day as *White Mountain*, Pinetop need not actually have applied for and been granted a trader's license for the tax to have been preempted.

To apply the Indian trader statutes to Lembke's activities would distort the meaning of "Indian trader" far beyond the intent of Congress. It is significant that the United States took the same position before this Court in the *White Mountain* case:

> Although it is not subject to the licensing requirements applicable to the trader in *Warren Trading Post*,[9] Pinetop is engaged in selling to Indians on a reservation. It sells its services to Fatco, . . .
>
> [9] References to "goods" in statutory provisions and regulations governing licensed Indian traders (see, e.g. 25 U.S.C. 264; 25 C.F.R. 251.3, 251.6), and the commonly accepted meaning of the term "trader," make it clear that sales of services are not governed by these provisions.
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> First Br. for U.S. as Am. Cur., p. 11.

This accords with the holdings of lower courts that have considered the question. *Mescalero Apache Tribe v. O'Cheskey*,

supra, is particularly relevant since the precise question, involving the identical tax, was ruled on by the United States District Court in 1977. At issue was whether New Mexico could impose its gross receipts tax upon non-Indian contractors performing construction services for the Mescalero Apache Tribe on the Mescalero Reservation. There the BIA had issued Indian traders licenses to the contractors. Holding that the BIA acted *ultra vires* in so doing, Judge Bratton wrote:

> There are marked differences between the nature of the activities undertaken by the contractors in this case and the kind of activities the federal licensing statutes and regulations cover.
>
> 439 F.Supp. at 1067.
>
> * * *
>
> What is determinative of the issue is the nature of the work done, the circumstances surrounding its performance, and the persons by whom it was done. Other than to issue the licenses to the contracting firms, there was no effort to impose the other requirements of the federal laws and regulations. Nor is there any evidence that it was ever intended that there be, no doubt because they simply did not cover the situation.
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> *Id.* at 1068.

Neither the United States, which was a party to the case at the trial level, nor the Tribe appealed this aspect of Judge Bratton's ruling.

Another federal district court has also interpreted the Indian trader statutes to be inapplicable to the sale of services on a reservation. In *United States ex rel. Keith v. Sioux Nation Shopping Center,* 488 F.Supp. 496 (D.S.D. 1980), Judge Bogue stated that "trade involves the exchange of *commodities* for other *commodities* or money." 488 F.Supp. 496 (Emphasis added). Accordingly, he dismissed charges of trading with Indians without a license in violation of 25 U.S.C. §264 against two defendants who sold insurance on a reservation, finding

that such sales were sales of a service, not of goods. See also *Palm Springs Spa, Inc. v. Riverside County*, 95 Cal.Rptr. 879, 18 C.A.3d 372 (1971), holding that the Indian trader statutes do not govern all commercial activity on Indian land.

The Board points to the federal regulations applicable to Indian trading on the Navajo, Hopi and Zuni Reservation, 25 C.F.R. Part 252, J.S. 86-87, as preempting New Mexico's tax since those regulations purport to regulate the sale of services on the Navajo Reservation.[68] Bd. Br., 33. This reliance is misplaced. To the extent that the regulations of Part 252 regulate services such as Lembke's, they are *ultra vires* because they exceed the authority of the Secretary. It is hornbook law that administrative regulations which extend the application of the statutes which they implement are invalid and may be disregarded. *Federal Communications Comm'n. v. American Broadcasting Co.*, 347 U.S. 284, 296-297, *reh. den.* 347 U.S. 965 (1954); *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930); *Peters v. Hobby*, 349 U.S. 331, 342-343 (1955). As stated by Mr. Justice Harlan:

> . . . we cannot but regard this . . . regulation as no more than an attempted addition to the statute of something that is not there. As such the regulation can furnish no sustenance to the statute.
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> *United States v. Calamaro*, 354 U.S. 351, 359 (1957).

For all these reasons, the regulations at 25 C.F.R. 252 can have no preemptive application in this case.

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[68] 25 C.F.R. 252.3(1), J.S. 87.

V. THE OTHER ISSUES RAISED ARE WITHOUT MERIT.

A. The New Mexico Enabling Act does not bar the tax in this case.

The Board urges that the New Mexico Enabling Act, 36 Stat. 558, Article XXI, §2 N.M. Constitution, prohibits the tax in this case. Bd. Br., 38-39. This contention is without merit. New Mexico's tax is upon Lembke's activities, not upon Indians or Indian land. The Enabling Act is a disclaimer of proprietary interest only, not a disclaimer of governmental interest or of jurisdiction to tax non-Indians. *Organized Village of Kake v. Egan,* 369 U.S. 60 (1962), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Washington v. Confederated Tribes of the Colville Indian Reservation,* 100 S.Ct. at 2082. The same issue was raised in the Petition for Certiorari in the *White Mountain* case, *supra.* By invitation of this Court, the Solicitor General filed an amicus brief urging review of other issues raised in the case, but not of that one, stating: "This contention does not warrant review by this Court." Br. U.S. as *Am. Cur.,* 12-13. Certiorari was not granted on the issue.

B. The Indian Commerce Clause does not prohibit this tax.

In part B of its *amicus* brief, the United States suggests that this Court adopt an interpretation of the Indian Commerce Clause (Art. I, sec. 8, cl. 3), which would prohibit state taxation of on-reservation activity of non-Indians when the activity involves an Indian tribe. U.S. Br. 17-24. This approach is contrary to long-established precedent. At least since *Thomas v. Gay,* 169 U.S. 264 (1898), this Court has rejected the proposition that state taxation of non-Indians engaged in business activity on an Indian reservation is an interference with Congressional power over Indian commerce. More recently, this Court squarely rejected this proposal in the *Colville* case:

> It can no longer be seriously argued that the Indian Commerce Clause of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. *Moe v. Salish and Kootenai Tribes, supra,* 425 U.S., at 481, n. 17, 96 S.Ct. at 1645.
>
> 100 S.Ct. at 2083

Even though New Mexico's gross receipts tax may have economically impacted the Board (and ultimately the United States, we would add), since it is nondiscriminatorily applied to all construction contractors within New Mexico, the Indian Commerce Clause stands as no bar to the tax. *Ibid.* The United States also tried to raise the Indian Commerce Clause argument in *Central Machinery, supra.* See Br. U.S. as Am. Cur., 11-16. This Court declined the invitation to expand the Indian Commerce Clause in its decision in that case, and it should do the same here.

CONCLUSION

The judgment of the New Mexico Court of Appeals should be affirmed.

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